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775-075—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1105

ABRAHAM L. KOOLISH, DAVID F. KOOLISH, AND JOHN B. CARNELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 513 (Pet. App. 1–41). Opinions of the district court are reported at 205 F. Supp. 637 and 221 F. Supp. 776 (Pet. App. 42–86).

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1965 (Pet. App. 87). A petition for rehearing was denied on February 25, 1965. By order of Mr. Justice White, the time for filing a petition for a writ of certiorari was extended to and including April 26, 1965. The petition for a writ of certiorari

was filed on April 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conviction of petitioners for mail fraud.

2. Whether the trial court erred in informing the jury of the guilty plea of a co-defendant who had been standing trial.

3. Whether the United States Attorney asked improper questions of various witnesses.

4. Whether the final argument of the United States Attorney was improper.

5. Whether petitioners were denied a fair trial by reason of pre-trial publicity.

STATEMENT

Petitioners and co-defendants Kline, Fadell, Zimmerman and Rettig were indicted in the United States District Court for the District of Minnesota for mail fraud and conspiracy, in violation of 18 U.S.C. 1341 and 371 (1 R. 1–20).[1] Fadell pleaded guilty during trial (Tr. 3223–3233), and Rettig was granted a severance due to illness (7 R. 1712). All defendants were convicted of conspiracy and of some, but not all, of the substantive charges (7 R. 1067–1070). Each of the Koolishes was sentenced to two consecutive terms of imprisonment for five years, to fines totaling $17,000 and to pay the costs of prosecution, which totaled

[1] Counts 1–15 of the indictment charged substantive offenses, count 16 charged conspiracy. The government withdrew counts 6, 7, 8 and 10 before the case was submitted to the jury (Tr. 8254).

$7,479.76.[2] Carnell was sentenced to five years' imprisonment.[3] The court of appeals affirmed.

The indictment charged that petitioners and others used the mails in furtherance of a scheme to defraud the Sister Elizabeth Kenny Foundation, as well as its contributors and prospective contributors, by diverting the funds received from large-scale direct-mail appeals to their own use, misrepresenting the true costs of such mail solicitation, bribing Foundation officers and engaging in other devious and fraudulent activities (1 R. 1–20).

The evidence showed generally that in the years 1951 through 1960 the Koolishes, through their companies, raised $21,855,285 in biannual mail campaigns for the Sister Elizabeth Kenny Foundation. Of this sum the Foundation received $8,850,559 (approximately 40 percent), and the balance was retained by the Koolishes as expenses (D.E. Z–265).[4] A portion of the retained amount was shared with Kline, executive director of the Foundation, and Fadell, its director of publicity.[5] See pp. 6–7, *infra*.

The function of the Koolish corporations was to furnish names of prospective donors and to mail out solicitations (Tr. 1026–1027). Each year a fall cam-

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[2] They were acquitted on counts 3, 5, 11 and 12 and convicted on the remaining counts. The court imposed a five-year sentence on counts 2, 4, 9 and 16 and a second five-year sentence on counts 1, 13, 14 and 15 (7 R. 1707–1708, 1743).

[3] His acquittal was on counts 3, 5 and 11; his conviction on counts 1, 2, 4, 9, 12, 13, 14, 15 and 16 (7 R. 1709).

[4] "D.E." refers to defendants' exhibits. "G.E." refers to government exhibits. All of these have been lodged with the Court.

[5] Fadell was at first a salaried employee and later was paid through a public relations agency which had offices with the Foundation (Tr. 646, 648–649).

paign was conducted, which purportedly was restricted to persons who had not previously contributed. The following spring, a smaller campaign restricted to previous contributors was held. The Koolishes furnished the names for the fall campaign at a price of $30 per thousand. These names had been obtained principally from telephone directories and were largely valueless in terms of net return to the Foundation (Tr. 2247, 2316–2317, 6738, 6745, 5267). In the 1956 campaign about twenty million solicitations were mailed, enough to reach approximately half the homes throughout the nation (Tr. 1058). Many of the addresses were outdated, so that there were vast quantities of undeliverable mail (Tr. 2373, 2565, 2567).

The Koolish companies guaranteed the Foundation against loss on the fall campaigns (Tr. 438, 3350, 3275). In order to protect themselves, the companies, without authority, extended the campaign to former contributors and charged the Foundation for the names thus used as if they were new names (Tr. 6527–6528). Notwithstanding this practice, the margin of receipts over expenses was often slender.* Expenses were always deducted and withheld from contributions before any money was turned over to the Foundation (Tr. 1137, 1185–1188).

The mailing of solicitations was to have been done by the Koolish companies at actual cost, with the Foundation advancing the estimated cost and the

*The 1959 fall mailing to approximately twelve million prospects improperly included one and a half million names from the Kenny contributor list (Tr. 3742, 6825). Without these contributors, there would have been a deficit of $427,000 (Tr. 4374–4376, 4409–4412, 6832).

companies rebating any excess over actual expenditures (Tr. 1026–1027; G.E. 157). No audits were made of the claimed expenditures, however, and the rebates were inconsequential (Tr. 2475–2476). The service performed by the companies at a charge of $69.50 per thousand names could have been performed by a local company at a saving of $27.94 per thousand (Tr. 8199).

The Koolishes conducted their operations through various companies—Empire Associates, Empire Industries, Inc., LeMarge Mailing Service Company, Inc., and New Century Corporation (Tr. 267, 4751–4752, 6401–6402, 6480–6481). In 1955, some of the directors of the Foundation had become apprehensive about dealing with the Koolishes, who were then operating through Empire Associates (Tr. 3361–3363). As a result, Abraham Koolish, through a dummy, bought all the stock of New Century Corporation, an organization which had become inactive (Tr. 3480). Co-defendant Rettig was named president and Carnell, who had been a key employee of Empire Associates, vice president (Tr. 6489). This ownership was concealed from the Board of Directors of the Foundation (Tr. 3011, 3283, 7980). A Special Events Committee, which was controlled by the Koolishes, was created to administer the national mail campaign (Tr. 1707, 1711, 1717, 595–596, 1704, 3660). The expenditures of this committee were falsely represented as the only expenses of solicitation in jurisdictions which limited the overhead for solicitation to

15 (Tr. 4542–4544, 4986) or 16 percent of the proceeds (Tr. 4835).[1]

The Koolish companies also used lists of Kenny contributors, which totaled about three million names, in other campaigns which they conducted (Tr. 2289, 3378–3379). They sold the Kenny lists for as high as $50 per thousand (G.E. 559,633).

The profits from these operations were shared with co-defendants Kline and Fadell, of the Foundation. In January 1952, shortly after the first of the big fall campaigns for new contributors, Fadell began receiving monthly payments of $2,500 from Empire Associates (Tr. 643–645, G.E. 314–1). This was raised to $3,500 monthly in March 1953. The total amount received by Fadell from Empire between January 1952 and December 1955 was $150,000. In the same period Fadell paid Kline $74,500, purportedly for acting as consulting engineer (G.E. 318).

These payments were continued when Empire was succeeded by New Century, so that Fadell received, during the period January 1956 through May 1957, the sum of $78,700. During the same period he paid $39,250 to Kline (Tr. 4083–4089; G.E. 318, 321), indicating an approximately equal division of the sums received from the Koolish companies.

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[1] About two-thirds of the true cost was shifted into "Costs of Therapist Training Operations; Medical Education and Training Programs; Public Education & Information Services; Promotion & Development of Additional Treatment Facilities; Grants for Medical Research; Publicity & Public Relations Operations, provided through National Headquarters" (G.E. 215, 3–9).

From May 1957 through May 1960, New Century paid Fadell $130,000. There was no evidence that Fadell made direct payments to Kline during this period, but Kline's son was placed on Fadell's payroll at $9,600 annually (Tr. 4092, 7686–7687). In all, Fadell and Kline received $359,200 (Tr. 4070–4071). Petitioners knew that Fadell was turning over part of these payments to Kline (Tr. 1124–1125, 7029, 7030). All these payments were charged as expenses to the fall campaigns and were thereby taken from the contributions intended for the Kenny Foundation (Tr. 3994, 1137, 1185–1188). It was also shown that New Century made gifts to Foundation employees totaling $9,300, and these were likewise charged to the cost of the fall mailing (Tr. 3995).

ARGUMENT

1. There is no merit to petitioners' claim that the holding of the court of appeals conflicted with decisions of the District of Columbia Circuit insofar as it relied to some extent on evidence introduced as part of the defendant's case or in the prosecution's rebuttal. In this case, unlike *Cephus* v. *United States,* 324 F. 2d 893 (C.A.D.C.), and *Franklin* v. *United States,* 330 F. 2d 205 (C.A.D.C.), there was adequate evidence to support each petitioner's conviction apart from that which was introduced by the defense. The proof of the conspirators' "close association and cooperation" (Pet. App. 12)—which was part of the government's case—sufficed to establish that they knew of Fadell's payments to Kline. And, in any event, petitioners' bribery of Fadell—whether or not they knew of any

additional arrangement between him and Kline—constituted ample evidentiary basis for the judgments of conviction.

2. Nor was it error for the district court to inform the jury, with appropriate cautionary instructions, that Fadell had pleaded guilty during the trial. Fadell's change of plea occurred after three weeks of trial, and the district judge accepted his guilty plea only after making a thorough investigation of the circumstances underlying it (Tr. 3140–3157). Fadell pleaded guilty to one substantive count pursuant to the district court's observation that a plea to the conspiracy count might suggest to the jury that other defendants had conspired with him (Tr. 3200–3201). After informing the jury that Fadell had pleaded guilty to count 6, the judge emphasized to the jury that his plea should not be considered "as any kind of persuasive evidence or showing" of the guilt of any other defendant (Tr. 3240–3241). The same cautionary instruction was given in the concluding charge (Tr. 8743–8744).

The procedure followed by the court was well within its discretion. *Wood* v. *United States*, 279 F. 2d 359, 363 (C.A. 8); *Davenport* v. *United States*, 260 F. 2d 591, 596 (C.A. 9); *United States* v. *Aronson*, 319 F. 2d 48, 52 (C.A. 2), certiorari denied, 375 U.S. 920. Especially in a trial as long as this, the sudden absence of Fadell as a defendant would have caused speculation which might have been prejudicial to the remaining defendants. The court could properly conclude that the best course was to tell the jurors what had happened and to give them proper in-

structions. And petitioners offered no suggestion for any more suitable explanation than the one given by the court. Petitioners' additional implication that Fadell might have been collaborating with government during the trial is without basis in the record. The trial court, which conducted a complete investigation of the circumstances, concluded that Fadell's attorney and the government representatives were truthful in denying the charge.* *United States* v. *Kline*, 221 F. Supp. 776, 789.

3. Petitioners also charge that the United States Attorney was guilty of misconduct during his interrogation of witnesses. Although the petition for certiorari does not specify the instances of alleged misconduct, they are set out in petitioners' brief in the court of appeals at pages 81–85. None of the claims has merit since in nearly all instances there was sufficient basis in the record for the questions

* Fadell's counsel told the court that at various times since the indictment he had freely advised other defense counsel of the possibility of a change of plea, that he had offered to withdraw from meetings with other defense counsel but had been asked to remain, and that Fadell's indecision had continued after the trial commenced (Tr. 3070, 3144, 3153). During the week preceding his request to change his plea Fadell first indicated what he wanted to do, and only the day before had word been received from the Department of Justice as to the counts on which the Department of Justice would be willing to accept pleas (Tr. 3154–3157).

asked by the United States Attorney and the questions were permissible exploratory inquiries aimed at matters covered in the witnesses' direct examination.[9]

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[9] Petitioners contend that there was no basis in the record for a question implying that in "Boston in one year over a third" of solicitation letters had to be thrown away (App. Br. 81). While the United States Attorney misspoke himself, and should have referred to Portland, Oregon, rather than Boston, the percentage of undelivered mail in Portland was shown to be 35 percent (G.E. 599). The percentage in other locations ran as high as 58 percent (Tr. 2501, 2561–2562; G.E. 596–603). There was also sufficient basis in the record for the prosecutor's interrogation of Philip Koolish with regard to a $2,500 payment to Fadell which was used to make a loan to one Dr. Warden (App. Br. 82). The books of Fadell and Associates and of Empire Associates permitted the inference that such a transaction had been consummated (G.E. 31, pp. RD 46, 44, J8).

The United States Attorney's suggestion (made during an objection to the defense's cross-examination of a government witness) that Fadell stopped payments to Kline, "only insofar as the books reflect" (at Br. 83), was based upon Government Exhibit 521, a passbook for a special account maintained by Fadell. Since this exhibit would have supported the observation only together with Fadell's explanation, and since Fadell was not called as a witness by the government in order to avoid prolonging the trial, the United States Attorney's assertion was never established in the record. However, there was adequate ground to believe that it would be proved at the time the observation was made.

The other questions challenged by petitioners in the court of appeals were either not objected to at the trial or were stricken upon timely objection being made. In one instance—the question asked by the United States Attorney of a government witness with regard to the loan made to Dr. Warden—the amount of the loan was either stated inadvertently as $25,000 or was inaccurately transcribed by the court stenographer. Finally, certain exploratory questions of defendants Zimmerman and Abraham Koolish were within the scope of those witnesses' direct examination and sought to inquire as to their knowledge of events to which other witnesses had testified.

The trial court was of the opinion that the questions complained of were not prejudicial. In any event, at the specific request of defendants, an extensive instruction was given directing the jury to disregard the questions and any inferences to be derived therefrom. *United States* v. *Kline*, 221 F. Supp. 776, 790–791. The court of appeals held that even if there was an excess of zeal on the part of the United States Attorney (which it did not find), the matter was well taken care of by the foregoing instruction. *Koolish* v. *United States*, 340 F. 2d 513, 532. There is, under the circumstances, no occasion for this Court to review this ruling.

4. There is, similarly, no substance to petitioners' assertions that the United States Attorney's summation was improper. Counsel's statement that leading questions had "made for a better understanding of the case" (Pet. App. 91) did not, as petitioners suggest, imply to the jury that untruthful representations were made during the questions or that counsel's assertions constituted evidence. The reference to what petitioner Abraham Koolish "saw" in Minneapolis was within the scope of permissible argument, and was, in any event, supported by the brochures prepared by the Koolish companies (G.E. 348–355). The references to other charities for which the Koolishes had performed their services were also supported by the record, and these charities were, in fact, referred to on many occasions by petitioners' own counsel (Tr. 8547, 8585, 8586, 8617–8621, 8623; Tr. 8547, 8585, 8617, 8622–8623; Tr. 8588, 8604, 8608, 8611; Tr. 8569, 8586).

The passing reference made during summation to the fact that the Koolishes were "wealthy" (Pet. App.

102) was responsive to their own counsel's statements regarding their wealth (Tr. 8609, 8623). Similarly, the brief mention of government "expenses" and time spent on the case (Pet. App. 104) was responsive to petitioners' references to the large staff and the long investigation which resulted in their indictment (Tr. 8629, 8635, 8475). In each of these instances, the allegedly prejudicial statement brought to the jury's attention a fact which was first emphasized by petitioners themselves.

Nor is *Windisch* v. *United States*, 295 F. 2d 531, 533–534 (C.A. 5), any support for petitioners' position. In that case, a far more questionable argument than is involved here was held not to constitute reversible error in light of the court's cautionary instructions. Here too the court instructed the jury to disregard "[t]he arguments, comments, observations, expressed beliefs and opinions" of the lawyers "unless they coincide with your own recollection of the facts and your own deductions from those facts" (Tr. 8735–8736).

The passing reference to a potential government witness who was not called (Pet. App. 92) was not objected to at trial and seems patently insignificant. And the prosecutor's statement that "I did as you did, I took an oath, and I do [my duty]" (Pet. App. 104) was merely an admonition to the jury to do its duty. See *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 638 (C.A. 2), certiorari denied, 329 U.S. 742.

5. Inevitably, from the nature of the charges made, there was considerable publicity concerning this case before trial. However, the *voir dire* examination

showed how little this publicity had affected the members of the panel. One panel member said that the matter had been mentioned in the papers but he had never read about it; another said that she had read something about it, but nothing specific; a third replied that she had read about it over the years, but that "you can't always go by newspapers" (Tr. 42, 47, 50). Only seven members of the panel had ever formed an opinion about the case. Regardless of how indefinite that opinion may have been, all were excused (Tr. 55, 62, 91, 117, 141, 142, 149). The court granted fourteen peremptory challenges, stating that additional motions might be made after these were used, if counsel saw fit (Tr. 11). After the strikes had been made, there were objections to only two jurors, neither of which was based upon pre-trial publicity or knowledge about the case (Tr. 158). The challenge to the array was not renewed. The selectivity shown by the jury in its verdict is indicative of a lack of passion or prejudice on its part. *Blumenfield* v. *United States,* 284 F. 2d 46 (C.A. 8), certiorari denied, 365 U.S. 812. And the court's procedure satisfied the standards set by this Court for obtaining a fair and impartial jury. *Beck* v. *Washington,* 369 U.S. 541.

Petitioners also contend that the trial court ignored a list of 79 questions which were submitted for the court to put to the panel. At a colloquy during the examination, the court observed that the questions asked by the court covered the substance of those requested. Some of the proposed questions—such as those relating to the number of children of the members of the panel, their names, ages, where they

attended school—were properly considered irrelevant (Tr. 125–129). The petition does not specify which of the requested questions were not covered or in what other respects the *voir dire* was improperly curtailed.

CONCLUSION

The two courts below have given detailed and patient examination to each of petitioners' factual contentions, and all have been found to be without merit. It is respectfully submitted that further review by this Court of petitioners' general allegations is unwarranted, and that the petition for a writ of certiorari should be denied.

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